Supreme Court, U. S.
FILED
AUG 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

79-295

No. .....

MARGARET L. POLLARD,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL J. GOLDSTEIN
Attorney for Petitioner
1003 Law and Finance Building
Pittsburgh, Pennsylvania 15219

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BEREGREN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
(412) 881-7468

INDEX.

	Page
Opinions Below	1
Questions Presented for Review	3
Statement of the Case	4
Reasons for Granting the Writ	12
Memorandum of Authorities	13
I. The death certificate is admissible in evidence	13
The Coroner's certificate and the pathologist's report are admissible in evidence	17
II. What is meant by accidental death?	18
III. It is an abuse of discretion where the trial judge refuses to exercise his discretion	29
Appendix A—Petition for Rehearing Before Court *en banc*	33
Appendix B—*Sur* Petition for Rehearing	41
Appendix C—Opinion	43
Appendix D—Order	66
Appendix E—Transcript of Proceedings, June 6, 1977	68

TABLE OF CASES.

Allegheny Trust v. State Life, 110 Pa. Super. 37	17
American Photocopy v. Rovick, Inc., 384 F.2d 813 cert. den. 390 U.S. 945	18
Beckham v. Travelers Insurance Company, 424 Pa. 105	3,8,25,26
Cockcroft v. Metropolitan Life, 125 Pa. Super. 293	17
Crawford v. Manhattan Life, 280 Pa. Super. 150 (1966)	13
Daburlos v. Comm. Ins. Co. v. Newark, 521 F.2d 18 (1975)	13

Page

Frane v. Prud. Ins. Co., 358 Pa. 103 14
Fullerform v. American Pipe, 44 FRD 453 18
Grow v. Wolcott, 123 Vt. 490, 194 A.2d 403 (1963) .. 31
Hanna v. Rio Grande National Life Insurance Co., 181 S.W.2d 909 (Texas) 19
Heffron v. Prud. Ins. Co., 137 Pa. Super. 69 14
Hunter v. Derby Food Company, 2nd Cir. 110 F.2d 970 13
In Re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.) (Aldisert, J., dissenting), *cert. denied sub nom.* Schofield v. United States, 421 U.S. 1015 (1975) 31
In Re: Marks, 121 Pa. Super. 181 14
Insulation Wood v. Home Assurance, 176 F.2d 503, 10th Cir. 18
Interchemical Corporation v. Watson, 145 F. Supp. 179, aff. 251 F.2d 390 D.C. 18
Jamison v. Miracle Mile Rambler, 536 F.2d 560 (1976) 13
Kearbey v. Reliable Life, 526 S.W.2d 866 22,23
Kubacki v. Metropolitan Life Ins. Co., 1960, 193 Pa. Super. 138 24
Landress v. Phoenix Mutual Life Insurance Company, 291 U.S. 491 12,26
Lederer v. Metropolitan Life Ins. Co., 4 Atl. 2d. 608; 135 Pa. Super. 61 14,29
Life Ins. Co. of Georgia v. Thomas, 210 S.E.2d 250 (Geo. C.A. 1974) 28
Lind v. Schenley, 278 F.2d 79 (3 Cir. 1960) 24
Malanga v. Royal Indemnity Company, 101 Ariz. 588, 422 P.2d 704 (1967) 23,27
McKee v. Jamestown Baking Co., 3rd Cir. 198 F.2d 551 13
Meth v. United Benefit Insurance Co., 198 F.2d 446 3rd Cir. 13,15
Metropolitan v. Main, 383 F.2d 952 (5th Cir.) 19,24
Miller v. Continental Insurance Co., 358 N.E. 2d 258 25,26,27
Minyen v. American Home, 443 F.2d 788, 10th Cir... 17
Moran v. Pittsburgh-DeMoines, 3rd Cir. 183 F.2d 467 13

Page

Mulholland v. F & C Ins. Co., 161 Pa. Super. 475 ... 17
National Life and Accident v. Fendor, 247 S.E. 2d 195 15
Norwood v. Great American Indemnity Co., 3rd Cir. 146 F.2d 797 13
Platt v. Minnesota Mining & Manufacturing Co. 376 U.S. 240 (1964) 31
ProcessSteel, Inc. v. Massley, 421 F.2d 1074 18
SEC v. Chenery Corp., 318 U.S. 80 (1943) 32
Smith v. John Hancock Ins. Co., 254 F.Supp. 622 (1966 D.C. Pa.) 15,24,25
Spott v. Equitable Life Insurance Co. of Iowa, 25 Cal. Rep. 782 19
Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705 (D.C. Cir. 1977) 32
Thomas v. C & B RR, 133 F.Supp. 533 13
Trotter v. Ins. Co., 115 Pa. Super. 487 14
United American Life Insurance Company v. Beadel, 475 Pac.2d 288 19,27
United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976) . 30
United States v. Long, 574 F.2d 761 (3d Cir. 1978) ..30,31
Weiner v. Metropolitan Life Ins. Co., 416 F.S. 551 (1976) 15

STATUTES.

Act of June 25, 1948, C 646; 62 Stat. 928, 28 U.S.C.A. Sec. 1254 2
35 P.S. Pa. Sec. 450.810 15

Page

RULES.

Fed. R. Crim. P. 21(b) 31
Federal Rule of Evidence:
Rule 402 29
Rule 403 2,3,12,30,31
Rule 704 29
Rule 803(9) 15,17
Rule 32(a)4 18
Rules 901(7) and 902(3) 17

MISCELLANEOUS.

133 A.L.R. 255 13
Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635 (1971) 31
Vance on Insurance, 2d. Ed., Sec. 258 19

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

MARGARET L. POLLARD,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, MARGARET L. POLLARD, prays that a Writ of Certiorari be issued to review a judgment of the Court of Appeals for the Third Circuit entered on May 8, 1979, Petition for Rehearing filed on May 16, 1979 and denied on June 1, 1979.

Opinions Below

The decision in this case was by a divided court, the opinion having been written by Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania

sitting by designation with Judges Adams and Weis, Circuit Judges. Judge Adams, Circuit Judge, wrote a dissenting opinion claiming that the trial Court committed two (2) errors which could not be overlooked under the Harmless Error Rule in that the Trial Judge failed to instruct the jury on a fundamental issue in the case, *viz.*: The meaning of accidental death.

Secondly, the Judge excluded statements contained in the death reports and Coroner's records attributing the decedent's death to accidental causes without complying with the mandate of Federal Rule of Evidence 403.

The case is reported at .... Federal 2d. Page .....

Thereafter, Appellant submitted a Petition for Rehearing which was denied on June 1, 1979. The Petition and Order denying re-hearing are herewith reproduced and marked as Appendix A and Appendix B. The Opinion of the Court of Appeals is herewith reproduced and marked Appendix C. The Opinion of the United States District Court (Sorg, J.) is reproduced herein and marked as Appendix D.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, C 646; 62 Stat. 928, 28 U.S.C.A. Sec. 1254, providing, *inter alia,* for jurisdiction of this Court review by Writ of Certiorari, the judgment of the Court below.

Apart from the alleged commission of fundamental error by the Trial Judge in failing to explain to the jury the meaning of accidental death, the Court erred in failing to apply the Federal Rules of Evidence, as amended, and more particularly Section 403 thereof.

Questions Presented for Review

I. Counsel for your Petitioner urges that the Trial Judge committed fundamental error in failing to charge Plaintiff's requests as herein set forth:

> 7. Where one voluntarily takes any substance into the stomach through the mouth causing a result, namely death unexpected, unforeseen and unanticipated for such person the means is accidental: *Jones v. Aetna Life,* 439 S.W. 2d 721.

II. The Court erred in failing to explain to the jury what is meant by accidental death and mislead the jury in giving them the option in creating the inference that intentional ingestion of drugs and/or alcohol could not result in accidental death, contra-distinguished from *Beckham vs. Travelers Insurance Company,* 424 Pa. 105.

III. The Court erred in finding that documents containing opinions or evidence relating to the ultimate issue in the cases were not admissible in opining as follows:

> IT APPEARING that the death certificate relating to the insured was properly admitted into evidence subject to the limitation that no admitted documents or testimony would be employed to convey to the jury an opinion on the ultimate issue in the case, i.e., the accidental, homicidal, or suicidal manner of the insured's death, the decision in *Lederer v. Metropolitan Life Insurance Company,* 135 Pa. Super. 61, 69, 4 A.2d 608, 612 (1939), upon which Plaintiff relies, having expressly reserved opinion on this question.

IV. The Court erred in excluding relevant evidence under Rule 403 in failing to exercise its discretion by weighing the probative value of said evidence against the possibility of unfair prejudicial effect.

Statement of the Case

At the trial of this case, the Court refused to allow into evidence for the jury's consideration, the Death Certificate, the Coroner's Certificate, and the report of the autopsy prosectors, who expressed an opinion classifying the death as accidental. When the autopsy was performed, it was assumed that asphyxiation was the result of the ingestion of alcohol alone by virtue of the high blood count. Subsequently, it was developed by blood analyses that in addition to the ingestion of alcohol, several drug compounds in the nature of valium, darvon and a barbituate were ingested and contributed to decedent's death by asphyxiation resulting from regurgitation of stomach contents.

Walter Pollard became insured under a policy of personal accident insurance in June of 1974 in the amount of $120,000, the premium on which was paid by the employee. On or about October 7, 1974, the decedent, a management consultant, was directed to Hampton, South Carolina to do a study on one of the corporate divisions situate in Hampton, South Carolina, having left his home in Greensburg, Pennsylvania early that morning but arriving at Hampton, South Carolina at approximately 4:00 p.m. After touring the plant with the superintendent and other personnel, he drove to Micarta Lodge, a facility owned and operated by Westinghouse Electric Corporation for the convenience of its employees, there being no restaurant or hotel facilities less than 18 miles distant in Allendale, South Carolina. Each guest was assigned a separate bedroom and meals and beverages were available. At about 6:45 p.m., a group of employees drove to Allendale, South Carolina for dinner where drinks were served, returning to the Lodge at about 9:00 p.m. The witness, Bittner, testified that at approximately 9:45 p.m., the decedent was sitting in the lounge with a Mr. Harrington, and observed that

the decedent's speech was slurred (T. 17) and that he was apparently drunk, that in attempting to rise he stumbled and slumped to his knees, whereupon the witness and Mr. Harrington escorted him to the bedroom where he was placed on his bed fully clothed lying on his back (T. 21) and was uncertain that the decedent knew what was happening. The next morning he was found dead lying on the floor between the bed and the wall, rigor mortis having set in. The witness, Shea, testified that when the decedent arrived at Micarta Lodge he had a bag and a brief case and that Mr. Pollard telephoned his home (Mrs. Pollard later verifying this call) to inform her that he would be home earlier in the week than he expected. He testified that while Pollard was being escorted to bed, he stumbled and fell down, visably intoxicated (T. 39).

The next morning when the body was discovered there were no pills, pill bottles, glasses or any evidence that he had voluntarily ingested any medication or pills. A bottle of belladanel was found in his brief case, Mr. Pollard having had a prior history of stomach ulcer and disorder for which he had been prescribed certain medication. Mrs. Pollard testified that her husband was accustomed to several drinks each day, that he was happy, well adjusted to society and with his family and wife and four children, was ambitious, and that he had just gotten a raise in salary.

The body was removed from the scene by the Coroner of Hampton County, South Carolina and an autopsy was performed by the Pathology Department of the University of South Carolina which also did a blood analysis resulting in findings of a .322 percentage of ethanol in the decedent's blood; 0.4 milligrams per deciliter of propoxyphene; 1.6 milligrams per deciliter of phenothiazine; and 2.1 milligrams per deciliter of barbituates (pentobarb).

The widow had also filed a Workmen's Compensation claim against the employer and the deposition of Dr. Gadsden, a toxicologist and Dr. Brissie, a pathologist, were taken pursuant to both cases at the University of South Carolina at Columbia, South Carolina. Dr. Gadsden testified that in his opinion not one of the three drugs or ethanol was lethal alone, although he testified that the quantity of propoxyphene and ethanol found were close to lethal levels (T. 151). The cause of death was stated that he died "as a result of aspiration of gastric contents, that being the terminal event which resulted from central nervous system depression as a result of ethanol and tranquilizer intoxication."

During the trial, the court recessed for lunch and indicated that counsel would be heard at 1:45 p.m. (on the admissibility of the death certificate and the Coroner's reports including the autopsy protocol (T. 174-5)). Counsel and the Court were in chambers until 2:15 p.m. during which the Court refused to permit the foregoing materials to be submitted to the jury.* The list of the exhibits made during the trial indicates that this material was attached to Dr. Brissie's deposition marked Exhibits "A" and "B", the death certificate marked Exhibit "10" was admitted. The jury was not permitted to have these exhibits prepared by the parties closest to the scene; *viz.*, the Coroner of Hampton County and the Pathology Department of the University of South Carolina.

There was no evidence in this case of suicide or suicidal intent and counsel for Metropolitan argued that the insurance program in the case at bar was set up early in 1974, but Pollard did not apply for it until June, 1974, about four months prior to his death, arguing to the jury that this was

* The transcription of the colloquy occurred in the Judge's Chambers between 1:45 and 2:15 p.m. (T. 176) and is absent from the record.

evidence of suicidal intent. The only question which should have been submitted to the jury was the question of whether or not his death was accidental which was the conclusion of the only witness who had first-hand and eyewitness information on this.

The jury found for the Defendant, but during the deliberation requested additional instructions on the meaning of preponderance of the evidence and the court charged the jury in essentially the same language without explaining or illustrating the meaning of the phrase.

The court charged, in mentioning preponderance: "It simply means that whatever evidence there is on one side of an issue is of greater convincing force, however slight, than the evidence to the contrary."

Petitioner also urges error on the part of the Trial Court in refusing to permit the death certificate to be offered in evidence and the Coroner's certificate, together with the reports of the pathologist and toxicologist at the Medical University of South Carolina, t permit their opinions to go to the jury, that is, that the decedent died an accidental death (death certificate) or that the death was "best classified as accidental" (autopsy prosectors).

The Petitioner submits also that the court failed to explain to the jury the quality of opinion evidence and how the jury should consider such evidence with regard to the weight to be given the same.

The autopsy reports were attached and admitted into Dr. Brissie's deposition as Exhibits "A" and "B" and used as the basis for his testimony. The court, nevertheless, excluded them from the jury's consideration, but did, however, indicate that the jury could examine certain portions of the

deposition exhibits (T. 214) which was not done. The basic issue in the case was whether or not the decedent's death by asphyxiation caused by the regurgitation of his gastric contents was accidental death. There was not a scintilla of evidence that the decedent voluntarily ended his own life, in fact, the contrary appears from an examination of the bedroom where the decedent was found on the morning of his death, there being no evidence whatsoever that he even had access to the drugs found in his blood stream (in fact, murder is as equivalent a hypothesis as suicide). The court erroneously departed from the doctrine of *Beckham*, Mr. Black for the Defendant outlining to the jury (T. 315) in his opening statement an inference that the quantity of drug levels would conclusively establish suicide. Although counsel for the Plaintiff objected, the court indicated that this was merely a "contention."

Dr. Brissie classified the decedent's death as accidental and Dr. Wecht, eminent pathologist, testified that with an alcohol level of .322 his mental processes were severely compromised and he could not have formed any intention of committing suicide (T. 253). Dr. Edberg testified contrarywise that even with an alcohol blood level of .322, the decedent could still arrive at a conscious decision to end his life. The policy in suit excludes death from intentional, self-inflicted injury. It does not specifically use the word "suicide." Dr. Edberg, also called as an expert, made answer to a hypothetical question based partially, however, on the entire record of the Workmen's Compensation proceeding (T. 225) which Dr. Edberg testified he examined and which was not in evidence in this case (T. 343-4) and concluded that the decedent could have formed a conscious intent to take his own life (T. 374).

In this posture of the case, the jury was only concerned with determining whether or not the decedent did or did not destroy himself intentionally and counsel submits that there

was no evidence to support this conclusion, the issue of accidental death having been sidestepped. It is clear that asphyxiation caused by regurgitation is an accidental death. In fact, the court should have so charged the jury.

Defendant offered to prove by the testimony of Dr. Winek, a toxologist, that the decedent intended to ingest the drugs and that his death was a suicide (the drugs in question were darvon, pentobarb and thorazine), although the court excluded this testimony after considerable argument.

It is clear that the record is utterly devoid of any suggestion, inference, innuendo, testimony or evidence that the decedent intended to destroy himself by getting drunk and consuming large quantities of pills used primarily to relax the body. Remarkably enough, the decedent's bedroom gave no help in this area (or if he was murdered, the killer removed all of the evidence).

The court charged the jury that they were required to determine if the asphyxiation was caused by the voluntary ingestion of alcohol and drugs. This is fundamental error and certainly not the issue in the case. The court said:

> Now, even though from the facts and circumstances of this case you find that it is possible to infer that the insured's death resulted from accidental means, if you also find it is equally plausible to infer that the insured's death resulted from other means such as intentional self-inflicted injury, then your verdict must be for the defendant.

The court also charged:

> The term 'accidental' means undesigned, unintended, unexpected, and unpremeditated. The word 'accidental' is the antithesis of intention. The concept is further set forth in terms and conditions of the policies in issue as

follows: 'In no case shall any payment be made for death or any other loss which is caused by or resulting from intentional self destruction or intentional self-inflicted injury while sane or insane.'

In determining whether or not the plaintiff has met her burden, you should first decide the cause of Mr. Pollard's death. The coroner's certificate indicates the death was caused by asphyxiation. If you find that asphyxiation was the result of the ingestion of drugs or drugs and alcohol in harmful quantities, an inference that the consumption of drugs or drugs and alcohol was the cause of death is permissible. If the consumption caused the asphyxiation, then the consumption of the drugs or drugs and alcohol was the cause, or an inference that the consumption of drugs or drugs and alcohol was the cause of death, if it causes the asphyxiation. But, this is for you to determine.

You are then required to determine whether or not the substances that caused asphyxiation were intentionally taken by Mr. Pollard for the purpose of self destruction or for the purpose of inflicting serious bodily injury upon himself. In making this decision, you are permitted to consider the fact that there is in human nature, an instinct for self-preservation. But these circumstances does not in and of itself establish the fact that Mr. Pollard died through accidental means. You may regard this as a fact, but must consider all the evidence in determining whether or not Mr. Pollard's death was accidental.

Even after the supplementary charge, counsel urges that the jury was confused on the meaning of preponderance.

Counsel for the Petitioner submitted points for charge, *inter alia*, that there was no evidence of self-destruction and that death was the result of the ingestion of foreign substances causing regurgitation and ultimate death by asphyxiation and is an accidental death. The court refused to charge on the "presumption against suicide" and ignored the Law of Pennsylvania and the Federal Rules of Evidence on the issues in the case in the matter of admissibility of the death certificate and the autopsy reports.

The complaint seeks to recover the benefits of two policies, to-wit, the sum of $15,250 under group policy No. 17300-G and $120,000 under a personal accident insurance plan in accordance with group policy No. 23214-G. Group policy No. 17300-G excluded liability on the part of the insurer if death was:

(D) caused by or resulting from intentional self-destruction or intentionally self-inflicted injury, while sane or insane, or

(E) caused wholly or partly, directly or indirectly, by injury entitling him to benefits under any workmen's compensation or occupational disease law or other similar legislation.

Inter alia, the personal accident policy excludes payment for death:

(D) caused by or resulting from intentional self-destruction or intentionally self-inflicted injury, while sane or insane or,

(E) caused by the Employe's being under the influence of any narcotic unless administered on the advice of a physician.

Curiously enough, neither Dr. Brissie nor Dr. Wecht were permitted to testify that death was accidental, yet Dr. Edberg for the Defendant called as an expert opinion witness was permitted to testify that on the basis of the blood analysis the insured's death was suicide. This tenuous inference that the quantities of drugs found in blood levels would, of necessity, be ingested voluntarily for the purpose of ending his life is presumably a conclusion not based on the testimony and is clearly error.

Counsel for the Petitioner respectfully submits that either the case be sent back to trial under proper guidelines or that judgment be entered for the Petitioner, there being no evidence of self-destruction the insured's death clearly being accidental.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals erred in holding that the exclusion of the documents indicating accidental death was not in violation of Federal Rule of Evidence Section 403, on the theory that the "probative value thereof is outweighed by the danger of unfair prejudice". The sole issue in the case was a determination of accidental death which was the ultimate issue for determination, hence the evidence had greater probative value than mere opinion testimony.

II.

The decision of the Court of Appeals in effect overrules *Landress vs. Phoenix Mutual Life Insurance Company*, 291 U.S. 491 which abolished "artificial distinction between accidental means and accidental results".

III.

The Trial Judge failed to exercise the duty contemplated by Federal Rule of Evidence Section 403 to determine whether or not the admissibility of the Coroner's records and the Death Certificate would result in unfair prejudice outbalancing the probative value thereof since the toxicology reports completed subsequent thereto did not change the cause of death.

MEMORANDUM OF AUTHORITIES

I.

The death Certificate is admissible in evidence.

Under Pennsylvania law, interpretation of contracts is governed by law of state where contract was made. *Jamison vs. Miracle Mile Rambler*, 536 F.2d 560 (1976) holds that under doctrine of conflicts of laws, beneficiary's action on airline trip policies was governed by substantive law of Pennsylvania, the place where the policy was issued and delivered. *Daburlos vs. Comm. Ins. Co. vs. Newark*, 521 F.2d 18 (1975) under traditional Pennsylvania law, interpretation of insurance contract is governed by the law of the state where the contract was made: *Crawford vs. Manhattan Life*, 280 Pa. Super. 150 (1966).

Thomas vs. C & B RR, 133 F.Supp. 533, held that a death certificate is *prima facie* evidence of the facts contained therein, but always open to contradiction by *any* party.

Norwood vs. Great American Indemnity Co., 3rd Cir. 146 F.2d 797

Meth vs. United Benefit Insurance Co., 198 F.2d 446 3rd Cir.

Moran vs. Pittsburgh-DeMoines, 3rd Cir. 183 F.2d 467

McKee vs. Jamestown Baking Co., 3rd Cir. 198 F.2d 551

Hunter vs. Derby Food Company, 2nd Cir. 110 F.2d 970

See 133 A.L.R. 255

In *Norwood, supra*, the court held that:

C.A. Iowa 1968. Report of medical examiner, who withdrew blood sample from decedent's cadaver, was admissible, in wrongful death action, both under statute

providing that reports of a medical examiner's autopsies shall be received as evidence in any court, and under implied consent statute, notwithstanding fact that, with respect to admissibility under latter statute, needle used to extract blood was not in factory wrapped package and sample was not taken at written request of a peace officer. ICA Sec. 321.271, Sec. 321B.1 et seq., 339.9. *Jacobsen v. International Transport, Inc.*, 391 F.2d 49, cert. den. 89 S.Ct. 105, 393 U.S. 833, 21 L.Ed.2d 104.

* * *

Autopsy report's anatomical diagnosis was admissible in wrongful death action where diagnosis was based on direct examination of deceased, and diagnosis was relevant to issue of cause of death. *Bowman v. Redding & Co.*, 449 F.2d 956, 145 U.S.App.D.C. 294.

Statements made by the attending physician on a death certificate are always open to explanation: *Frane vs. Prud. Ins. Co.*, 358 Pa. 103.

Death certificates are within the "public documents" exceptions to the hearsay rule (*In Re: Marks*, 121 Pa. Super. 181), and are *prima facie* evidence which may be explained or contradicted: (*Trotter vs. Ins. Co.*, 115 Pa. Super. 487).

Prior to the Business Records Act, it was the Pennsylvania rule that the death certificate was not admissible to prove collateral matters, such as the cause of death, for example. Since the title of the Act gives no notice of a change in the rules of evidence, the question has arisen, but is as yet unanswered, as to whether the Act would be constitutional for the purpose of permitting the death certificate to constitute *prima facie* evidence of the cause of the death: *Heffron vs. Prud. Ins. Co.*, 137 Pa. Super. 69.

In *Lederer vs. Metropolitan Life Ins. Co.*, 4 Atl. 2d. 608; 135 Pa. Super. 61, the court held that a medically prepared death certificate stating that the cause of the death of the insured

was accidental carbon monoxide poisoning was erroneously excluded from the evidence.

To the same effect is *Smith vs. John Hancock Ins. Co.*, 254 F.Supp 622 (1966 D.C. Pa.) which held that a coroner who prepared a death certificate attributing death of the insured to shock and a crushed chest in a car accident was properly admitted into evidence as *prima facie* proof.

It should be noted that a death certificate of a physician attending the deceased insured was admissible as to the date of the insured's death and the cause thereof, and was also *prima facie* evidence of the date of the onset of the illness causing disability, but was not conclusive as to such purposes, its weight was for the jury to determine, together with other evidence in the case: *Meth v. United Ben. Life Ins. Co., supra.*

In the event that the Court takes the position that the admissibility of a death certificate is a matter controlled by the Federal Rules of Evidence, the applicable law supports our position. *Weiner vs. Metropolitan Life Ins. Co.*, 416 F.S. 551 at 558 (1976) in a suit originally brought in State Court and removed to Federal Court concerning a life policy with an accidental death benefit rider, the court stated that a duly certified copy of insured's death certificate constitutes *prima facie* evidence of its contents, including the cause of death: 35 P.S. Pa. Sec. 450.810; Federal Rules of Evidence, Rule 803 (9), 28 U.S.C.A.

In *National Life and Accident vs. Fendor*, 247 S.E. 2d page 195, the court held that the death certificate and the autopsy report are admissible in evidence. The opinion held:

> The sole issue is whether the insured's death was under such circumstances as to bring him within the additional death benefit provisions of the policy.

The death certificate showed as to cause of death: 'immediate cause (a) probable accident due to falling and striking right side of head. Possible due to (b) many metabolities of sedative drugs found—meprobamate, valium and dalmane—these together possibly caused death—no other causes were found on autopsy.' The doctor who signed the certificate testified in explanation of this statement as to cause of death: 'In my opinion, anybody that is taking drugs, alcohol or anything like that, most common cause of death is accident. And, this was found in his body on autopsy and that's the reason these were listed. He further testified there were no visible injuries and no incision. He said the right side of the decedent's face was contused, but whether he struck it or whether it was due to his lying in that position, he didn't know and could not form an opinion; that it could have been caused by him lying there over several hours, and could have occurred subsequent to death as well as before.

* * *

The autopsy report was admitted into evidence only after the trial judge directed the deletion therefrom of the statements 'There is no evidence of head injury and so forth' and 'No anatomical cause of death found.'

1. The principal issue was whether the insured's death resulted from accidental means within the terms of the policy. The autopsy report, admitted into evidence, should have gone to the jury without having had excised the above quoted statements.

The death certificate standing alone was *prima facie* evidence of the facts therein stated. *Allstate Ins. Co. v. Holcombe,* 132 Ga. App. 111, 115 (3) (207 SE2d 537) (1974). Although this presumption is rebuttable, whether it is rebutted is generally a jury question. *Lathan v. Murrah Inc.,* 121 Ga. App. 554, 559, 174 questions as to the presumption, and the statements deleted from the autopsy report relate to that issue. It was error to exclude them.

In *Mulholland vs. F & C Ins. Co.,* 161 Pa. Super. 475, the doctor who completed the death certificate omitted to state whether or not death was the result of homicide, suicide or accident, hence incomplete and inadmissible. Obviously, if this information had been supplied (as in the case at bar) the certificate would have been admissible.

Failure to enter on the death certificate the manner of death is an important element of proof in an action on a life insurance policy: *Allegheny Trust vs. State Life,* 110 Pa. Super. 37; *Cockcroft vs. Metropolitan Life,* 125 Pa. Super. 293.

The Coroner's certificate and the pathologist's report are admissible in evidence.

The Court erred in refusing to allow the Coroner's certificate and the report of the pathologist into evidence to establish the classification of death.

In addition to the foregoing authorities, these documents were certainly admissible under the Business Records Act of Pennsylvania and the Rules of Federal Evidence effective November 20, 1972.

It cannot be gainsaid that these records were maintained in the regular course of the operation of these offices and institutions. These are records of vital statistics maintained by the Coroner's Otfice and are admissible in evidence under Rule 803(9), Exceptions to the Hearsay Rule.

These documents are also admissible as certified copies of official records under Ruie 901(7) and 902(3).

Minyen vs. American Home, 443 F.2d 788, 10th Cir., like Pennsylvania, held that in litigation under accident policies the death certificate was admissible in evidence. In addition, this case is authority for the proposition that a deposition of

the insured taken in a Workmen's Compensation proceeding was inadmissible since the issues are different, not to mention different parties (Idem. 450 F.2d 1081). Also *American Photocopy vs. Rovick, Inc.*, 384 F.2d 813 cert. den. 390 U.S. 945.

Rovick held that since the action involved different parties the deposition in a prior action was not admissible. According to *Fullerform vs. American Pipe*, 44 FRD 453, there must be identical parties and issues in order to permit the admission of depositions in a prior action.

In the instant case, over counsel's objections, the depositions were incorporated into the present action by reference and testimony of Drs. Gadsden and Brissie in the Workmen's Compensation proceedings vs. Westinghouse and were used by the Defendant as a part of the hypothetical question posed to Dr. Eilers which also contained other matters extraneous and dehors the record.

If the depositions are admissible, then they all must be admitted including deposition exhibits which comprise the death certificate, the coroner's certificate of death and the autopsy protocol: Rule 32(a)4: *Interchemical Corporation vs. Watson*, 145 F.Supp. 179, aff. 251 F.2d 390 D.C.

ProcessSteel, Inc. vs. Massley, 421 F.2d 1074 is authority for the proposition that the use of a deposition without offering it in evidence is disapproved: Idem: *Insulation Wool vs. Home Assurance*, 176 F.2d 503, 10th Cir.

II.

What is meant by accidental death?

An accident to the internal structure of the body meets the definition of accidental death.

Hanna vs. Rio Grande National Life Insurance Co., 181 S.W.2d 909 (Texas) quotes Vance on Insurance, 2d. Ed., Sec. 258, page 879:

> And referring to the policy terms of 'external' and 'violent,' same are referable to death or injury from an accidental or unnatural cause; the term 'external' applying to the force or means, and not to the injury. 'Thus, poison taken into the system, and operating entirely internally, is nevertheless an external cause, as is the water which causes death by drowning, and gas which causes asphyxiation. Likewise, the term 'violent', as applied to causes of accidental injury, means merely that the cause is efficient in producing a harmful result. It is not necessary that it shall be violent in the sense of breaking tissues or otherwise physically and visibly affecting the body.

In *Metropolitan vs. Main*, 383 F.2d 952 (5th Cir.) death was caused by a non-lethal dose of Medomin and a non-lethal amount of drinking alcohol. This constituted external means.

As the California court said in the case of *Spott vs. Equitable Life Insurance Co. of Iowa*, 25 Cal. Rep. 782, 783 (cited in appellant's brief):

> In a broad sense, it is semantically possible to view every cause of death as internal. Although the inducing cause be a blow or a bullet, the ultimately effective cause of death is the cessation of functioning of some vital organ, as the heart or lungs.

It must be remembered in the instant case that all of the drugs prescribed for the decedent were either anti-spasmodic or sedatives and were not for any specific disease or ailment.

In *United American Life Insurance Company vs. Beadel*, 475 Pac.2d 288:

> Judgment was affirmed in favor of deceased insured's estate in an action on a disability monthly income policy

when insured died of poisoning resulting from synergistic action of ethyl alcohol, short-acting barbiturates and meprobamate, with no evidence of suicide. The policy, providing coverage for accidental bodily injury, excluded coverage for death resulting from poison, voluntarily or accidentally taken, except in the course of insured's occupation. Insured's death was an internal injury effected through external violence and accidental means, within the terms of the policy, and was not excluded as a poison, which would be a substance having inherent deleterious property that could destroy life when taken internally.

Here the decedent died from the synergistic action of ethyl alcohol and meprobamate. The court discussed the question of accidental means at greater length:

> The first question is whether decedent died of bodily injury. The policy in question defines bodily injury under the facts here as:[1]
>
> '. . . an injury . . . effected . . . through external, violent and accidental means, as evidenced by . . . internal injuries revealed by an autopsy. . . .'
>
> In *Malanga v. Royal Indemnity Company*, 101 Ariz. 588, 422 P.2d 704 (1967), the deceased died on the combined effects of alcohol and barbiturates. His accident policy covered loss 'from accidental bodily injuries.' The Arizona Supreme Court examined whether the death was (1) a result of bodily injuries, and (2) accidental. It held that a bodily injury had indeed occurred because the body's normal functions were so interfered with that death insued. The Court also held the death was accidental because there was no evidence that the deceased expected or anticipated or desired the injury which resulted. No suggestion of suicide was presented.
>
> The basic difference between *Malanga, supra,* and the instant case is that here the policy more specifically defines 'bodily injury.' In *Malanga,* it was apparently undefined by the policy so the court construed the terms in their

> everyday connotation. Consequently, we must inquire whether the 'accidental bodily injury' language in the *Malanga* policy is the same or different from the 'externally inflicted violent accidental internal injuries' language here.
>
> The trial court found as a matter of fact that the death was accidental and the result of internal injuries revealed by autopsy, but since these findings are really mixed questions of law and fact, we review them as legal questions.
>
> [Alcohol and Drugs as Bodily Injury]
>
> To begin, the two phrases share several terms, which, since they are not further defined by the policies or which have been defined in *Malanga, supra,* we take as meaning the same in both phrases. First, both policies covered 'accidental injuries.' Second, *Malanga* held that the synergistic effect of alcohol and drugs was accidental and was a bodily injury. This was determined in the face of the insurance company's insistence that covered injuries must be revealed to be 'internal injuries' is different from 'bodily injuries', and under the instant policy language must be proven by visible signs and that the mere depression of the central nervous system is insufficient. We believe 'bodily injuries' includes 'internal injuries' and that *Malanga* settled this contention for both phrases:
>
> '. . . We cannot agree with this contention. If the Company had intended to limit the words "bodily injury" [or internal injuries] to injuries which were traumatic in nature, it might easily have done so by simply inserting such a provision in the policy. At best, the fact that such limiting provision is not present makes it uncertain whether the phrase "bodily injury" [or internal injuries] is so limited. When the language of such a policy is unclear this Court has been and continues to be guided by the general rule "* * * that policies of this nature are construed in favor of the injuries when any ambiguity appears therein." ' 101 Ariz. at 591.

This view is also expressed in *Stoffel v. American Family Life Ins. Co.*, 41 Wis.2d 565, 164 N.W.2d 484 (1969).

The remaining limiting words in the instant policy are 'externally violently inflicted.' Counsel for the insurance company contends these words, along with the language 'as evidenced by a visible wound or contusion' qualified the type of internal injury covered. They again insist traumatic injury, of a type revealed by visible internal or external lesions, is what is covered.

Black's Law Dictionary defines violent, externally caused death as not natural death, such as caused by disease or the wasting of vital forces. Also, in *Hahn v. Commercial Travelers Mut. Acc. Ass'n of America*, 256 App. Div. 835, 9 N.Y.S.2d 257 (1939), the court held that coverage under an accident policy for death due to 'violent external means' was made out for death by carbon monoxide poisoning.

We believe the death by alcohol and drugs here fits under both these definitions, and therefore, decedent's death was covered under the accident rider terms as being 'an injury effected through external violence and accidental means, as evidenced by internal injuries revealed by an autopsy.'

In *Kearbey vs. Reliable Life*, 526 S.W.2d 866, the court held that:

An insurer was liable for benefits under an accidental death policy when an insured died of a combination of drugs and alcohol. The policy failed to define the term bodily injury, but the physical reaction induced by the combination of alcohol and Butabarbital in the blood resulted in an internal bodily injury. Although the insured's consumption of the combination was intentional, the effect was not intended, and, accordingly, was accidental.

Kearbey cited *Malanga*, 422 P.2d 704 (Ariz.) wherein the insured died from overingestion of barbiturates and alcohol.

The policy insured against 'loss, resulting directly and independently of all other causes, from accidental bodily injury sustained during the term of the policy. . . .' The insurer argued that the death of Ellis did not result from 'accidental bodily injury and that unless there was a cut, bruise or a rupture of some part of the body, there has been no bodily injury within the meaning of the policy.'

At p. 707 the court said: We cannot agree with this contention. If the Company had intended to limit the words 'bodily injury' to injuries which were traumatic in nature, it might easily have done so by simply inserting such a provision in the policy. At best, the fact that such limiting provision is not present makes it uncertain whether the phrase 'bodily injury' is so limited. When the language of such a policy is unclear this court has been and continues to be guided by the general rule '* * * that policies of this nature are construed in favor of the injured when any ambiguity appears therein.' *Dickerson v. Hartford Accident and Indemnity Company*, 56 Ariz. 70, at 76; 105 P.2d 517, 519. Another principle often applied in these cases the undefined words of an accident insurance policy will be defined in the common sense terms of the average layman rather than in the terms of a highly technical medical definition.

Applying the above principles of the *Dickerson* opinion to the facts of the case presently before us we find that when the central nervous system of Jack Ellis was dulled to the point where automatic breathing and heartbeat were not sufficiently stimulated, so as to sustain life, the deceased incurred a 'bodily injury' within the meaning of the policy. In the sense in which the term 'bodily injury' is ordinarily used and understood, we think it is impossible to conclude otherwise. When a body is so affected that its normal functions are interfered with to the point where death results, the body has been injured.

In *Metropolitan vs. Mains, supra,* the insured died from the synergistic effect of alcohol and barbiturates resulting in a coronary arrest, and the 5th Circuit affirmed the verdict. the policy containing an exclusion against death resulting from or contributed to by disease or medical treatment based on the testimony of witnesses, both lay and medical, that the decedent was not (ostensibly) suffering from any disease and was in excellent health. This proposition was reiterated in the case of *Kubacki vs. Metropolitan Life Ins. Co.,* 1960, 193 Pa. Super. 138 and *Lind vs. Schenley,* 278 F.2d 79 (3 Cir. 1960) wherein the court discussed the distinction between awarding a new trial as against the weight of evidence and a new trial awarded for other reasons. The fact that the trial judge disagrees with the verdict is not an adequate reason for awarding a new trial; hence would be considered an abuse of discretion. It follows then that a new trial can be awarded only if the trial judge's rulings were erroneous where there is a conflict of testimony and the case was given to the jury.

In *Smith vs. John Hancock,* 254 F.Supp. 622 (W.D.Pa.) the court held that:

> Where it has been established that cause of insured's death was both violent and external and that insured had no apparent reason to take his own life, inference of accidental means of death makes out *prima facie* case.
>
> • • •
>
> [6] Where it has been established that the cause of death is both violent and external, and that the deceased had no apparent reason to take his own life, the inference of accidental means of death makes out a *prima facie* case for the plaintiff. *Wainstein v. Equitable Life Assurance Society,* 318 Pa. 428, 178 A.502 (1935). *Walters v. Western & Southern Insurance Co.,* 318 Pa. 382, 178 A.499 (1935).

At the time of Judge Weber's decision in *Smith,* the Supreme Court had not yet reversed the Superior Court in abolishing the distinction between accidental means and accidental result (Beckham case).

In *Miller vs. Continental Insurance Co.,* 358 N.E. 2d page 258, the court held that an insurer was liable for the payment of accidental death benefits under a group life insurance policy where a 20-year-old insured, who had been a habitual user of drugs, was found dead with a needle in his wrist. An autopsy ascribed the cause of death to an overdose of heroin. Although the injection was intentional, there was no evidence that the insured intended the injection of heroin to have a fatal effect. Accordingly, the intentional injury or death exclusion was not applicable to bar recovery of the accidental death benefits under the policy. Furthermore, the fact that possession of heroin is a criminal offense did not forfeit rights under the policy. The court stated:

> For instance, though one who drives a car while drunk metaphorically may be said to be 'committing suicide,' it does not necessarily follow that his resulting death is to be regarded as 'intentional' (*Beckham v. Travelers Ins. Co.,* 424 Pa. 127, 118 [concurring opn]). Instead, '[i]n construing whether or not a certain result is accidental, it is customary to look at the casualty from the point of view of the insured, to see whether or not, from his point of view, it was unexpected, unusual and unforeseen' (1A Appleman, Insurance Law and Practice, Sec. 391, p. 22, citing *McQuate v. Prudential Ins. Co. of Amer.,* 166 Miss. 524).

The court continued:

> Thus in the case before us, while it may be inferred that the decedent's introduction of heroin into his body was intentional, there is no proof whatsoever that he intended it to have fatal consequences or even that he was aware of

the fact that the particular dose of heroin that he was taking at the time posed any threat of death at all.

Further in the opinion, the court distinguished between accidental means and accidental death:

> Such an appreciation of the reality of things requires that the word 'accident' in the policy here be deemed to pertain not only to an unintentional or unexpected event, which, if it occurs, will foreseeably bring on death, but equally to an intentional or expected event which unintentionally or unexpectedly has that result.
>
> In contrast to cases in some other jurisdictions where there is no right to recover unless the means themselves are accidental (See Ann. 52, A.L.R. 2d 1085, Secs. 2,3,4; 10 Couch 2d, Insurance, Sec. 41.28, p. 47), New York long ago rejected such an over-nice separation of accidental means from accidental death as one 'certainly not understood by the average man, and he is the one for whom the policy is written.'

The *Miller* case, *supra,* is the most recent in a series of cases dating back to the Pennsylvania Supreme Court decision of *Beckham vs. Travelers Insurance Company,* 424 Pa. 107, 225 A.2d 532 (1967). The question before the court in *Beckham* was whether or not to adhere to the doctrine that recovery should be denied if the insured's death, although unintentional, resulted from an intentional act of the deceased. Recovery was permitted, at that time, when the proximate cause of death was itself the result of an unforeseen or unexpected event. The Supreme Court answered this question by adopting the reasoning of Mr. Justice Cardozo in his famous dissent in the case of *Landress vs. Phoenix Mut. Life Ins. Co.,* 291 U.S. 491, 54 S.Ct. 461 (1934). Cardozo stated:

> The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog.

The Pennsylvania appellate court decisions were indeed struggling in a bog, created by the artificial distinction between accidental results and accidental means. The Supreme Court examined the many decisions in this area both in the Pennsylvania courts and other courts in the several states, and concluded:

> However, rather than continue upon our present course, we prefer to confront the issue directly and to expressly abandon the artificial distinction between accidental means and accidental results. Continued adherence to this distinction would not only fail to serve a useful purpose but would condone ambiguity in a context in which we have traditionally insisted upon clarity and precision.

The frame of reference which the court uses in determining whether a certain result or a certain means is accidental is the point of view of the insured. The correct frame of reference is whether or not the consequences of the insured's acts were unexpected, unusual and unforeseen to him. See: *Miller, supra.*

In *United American Life Ins. Co. vs. Beadel,* S.W. 2d (Arizona, 1970), 475 P. 2d page 288, judgment was affirmed in favor of deceased insured's estate in an action on a disability monthly insurance policy when insured died of poisoning resulting from synergistic action of ethyl alcohol, short-acting barbiturates and meprobomate, with no evidence of suicide. The policy, providing coverage for accidental bodily injury, excluded coverage for death resulting from poison voluntarily or accidentally taken, except in the course of insured's occupation. The court held that the insured died of internal injuries, by alcohol and drugs, effected through external, violent and accidental means within the terms of the policy. Cited in the *Beadel* case was the case of *Malanga vs. Royal Indemnity Company,* 101 Ariz. 588, 422 P.2d 704 (1967).

Therein, the deceased died of the combined effects of alcohol and barbiturates. His accident policy covered loss "from accidental bodily injuries." The Arizona Supreme Court examined whether the death was a result of bodily injuries, and secondly, whether it was accidental. It held that a bodily injury had indeed occurred because the body's normal functions were so interfered with that death ensued. The court also held that the death was accidental because there was no evidence that the deceased expected or anticipated or desired the injury which resulted. The court put itself in the shoes of the insured in order to determine whether the consequences of the insured's acts were intended by him or accidental.

Even in cases such as *Life Ins. Co. of Georgia vs. Thomas*, 210 S.E. 2d 250 (Geo. C.A. 1974), where "accidental means" is defined narrowly, recovery is possible under the proper circumstances. In that case, the test is: "For death to be the result of accidental means, it must be the unexpected result of an unforeseen or unexpected act which was involuntarily done." In the *Thomas* case, an insurer was liable for the payment of the double indemnity benefit under a life insurance policy when an insured died of asphyxiation caused by regurgitated food clogging his windpipe a short time after consuming a platter of seafood and an alcoholic beverage for supper. Although the insured suffered from heart disease, emphysema, and brain damage from a prior stroke and arteriosclerosis, and could have died from natural causes, the jury determined from the evidence that the insured had died of a foreign body, the undigested food, clogging his windpipe. The court stated:

> His death was sudden, and violent in that the clogging of his windpipe prevented the body from receiving oxygen from the air through the lungs. Clearly, the death here was by accidental means. *Columbia Nat'l. Life Ins. Co. v. Miller*, 140 Ga. 346 (1) (78 S.E. 1079).

III.

It is an abuse of discretion where the trial judge refuses to exercise his discretion.

In his dissenting opinion Judge Adams stated:

> The district court refused to allow any of the documents to be introduced into evidence unless the portions dealing with the cause of death were excised. The trial judge apparently based these evidentiary rulings on two grounds. First, he ruled the evidence inadmissible because it conveys an opinion on the ultimate issue in the case. Second, he looked to Pennsylvania law, which does not have a clear rule whether documents prepared at the time of death are admissible to prove the cause of death.[13]

In affirming the district court, the majority recognizes that the Federal Rules of Evidence, not Pennsylvania law, govern the admissibility of evidence in this case. The Federal Rules operate upon the premise that [a]ll relevant evidence is admissible,"[14] and indeed declare outright that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[15] Thus, the evidence at issue here was clearly admissible under the Federal Rules, unless there was a countervailing reason for excluding it. The only such reason suggested by the majority is found in Rule 403, which gives the trial judge discretion to ex-

---

[13] *See* app. 25a, where the court's order denying plaintiff's motion for a new trial indicated that the statements in the documents that attributed death to accidental causes were held to be not admissible because (a) no evidence may be employed to convey to the jury an opinion on the ultimate issue in the case, and because (b) *Lederer v. Metropolitan Life Insurance Company*, 135 Pa. Super. 61, 69, 4 A.2d 608, 613 (1939), expressly reserved opinion on the question whether such statements were admissible.

[14] Fed. R. Evid. 402.

[15] Fed. R. Evid. 704.

clude any evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . ." The record makes it abundantly clear that this discretion was never exercised. There was no balancing of the probative value of the evidence tendered by plaintiff against any unfair prejudicial effect. Rather, the only references made were to Pennsylvania law regarding the admissibility of such documents and to a rule—different from that found in the Federal Rules of Evidence—that testimony conveying an opinion on the ultimate issue is inadmissible. Nonetheless, the majority asserts that what the trial judge did in this regard was not error. It does so by disregarding the actual basis of the trial judge's ruling and instead by itself engaging in the balancing required by Rule 403, concluding thereby that the district court's ruling was not "manifestly erroneous."

Putting to one side the issue whether the probative value of the evidence in question is outweighed by any unfair prejudicial effect,[16] the role that the majority delegates to itself is somewhat perplexing. The balancing contemplated by Rule 403 is, under the provisions of that rule, clearly to be performed by the trial judge. The reason is that it is the trial judge who is familiar with the evidence and who may examine the parties as to the circumstances surrounding the preparation of the documents and their accuracy, on the one hand, and possible unfair prejudice, on the other.[17] The role of the appellate court in this respect is very limited: the appellate court is to uphold the trial judge's ruling so long as he did not abuse his discretion.[18] Yet, according to the

[16] I do not venture a view whether in fact the tendered evidence should or should not have been excluded on the basis of a balancing under Rule 403, but should like to point out that the outcome is not foreordained. In any event, I do not believe that a ruling admitting the evidence in question would have been reversed as being "manifestly erroneous."

[17] *See* United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978).

[18] *See, e.g.*, United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976).

majority, we may affirm a district court *even if it never exercised its discretion,*[19] provided that the district court's result is susceptible to a *post hoc* rationalization, supplied by the court of appeals.

For a number of reasons, I cannot agree with the course of action adopted by the majority in this regard. First, it would appear that the failure of a district court to exercise its discretion is itself an abuse of discretion, even if attributable to an erroneous belief on its part that it is bound by some non-discretionary rule of law.[20] Second, as the Supreme Court has indicated, it is improper for a court of appeals to undertake "a *de novo* examination of the record and itself [exercise] the discretionary function which the rule commits to the trial judge."[21] Rather, "[t]he function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand."[22] Finally, *post hoc* rationalizations are always

[19] Needless to say, this is not a case where the district judge actually balanced under Rule 403 but failed to set forth the reasons supporting the manner in which he exercised discretion, *see* United States v. Long, 574 F.2d 761, 768-72 (3d Cir. 1978) (Adams, J., concurring).

[20] *See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635, 666 (1971), where the author quotes this passage from Grow v. Wolcott, 123 Vt. 490, 492, 194 A.2d 403, 404 (1963):

> [W]here a party has called upon the court for a discretionary ruling, it is improper for the court to refuse to utilize its right to decide the question as a matter of discretion. Purporting to be bound to a rule as a matter of law will not satisfy the moving party's aim on the court's discretion.

See also In Re Grand Jury Proceedings (Schofield II), 507 F.2d 963, 972 (3d Cir.) (Aldisert, J., dissenting), *cert. denied sub nom.* Schofield v. United States, 421 U.S. 1015 (1975).

[21] Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245 (1964), (court of appeals improperly ordered transfer of a multi-venue case where discretion was vested in the district court pursuant to Fed. R. Crim. P. 21(b)).

[22] *Id.*

suspect, and in other contexts have been held not to be acceptable substitutes for reasoned decisionmaking in the first instance.[23] I fail to see how this case is any different, particularly since here the rationalization has not even been provided by the original decisionmaker, but instead by a reviewing tribunal. Inasmuch as the exclusion of the evidence that was tendered in the present case cannot be said to have been harmless error, the proper course in my view would be to remand the case for a new trial.

Accordingly, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Respectfully submitted

SAMUEL J. GOLDSTEIN,
Attorney for Petitioner.

[23] *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80 (1943); Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705, 709-12 (D.C. Cir. 1977) (agency actions cannot be sustained on the basis of *post hoc* rationalizations supplied during judicial review).

APPENDIX A

Petition for Rehearing Before Court *en banc*

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1934

MARGARET L. POLLARD,
Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 75-811)

Submitted Under Third Circuit Rule 12 (6)
on January 16, 1979

Before: Adams and Weis, Circuit Judges, and Weiner, District Judge.*

Opinion Filed May 8, 1979

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

SAMUEL J. GOLDSTEIN, ESQ.,
1003 Law & Finance Building,
Pittsburgh, Pa. 15219,
Attorney for Appellant.

ALEXANDER BLACK, ESQ.,
BRUCE I. BOOKEN,
BUCHANAN, INGERSOLL,
RODEWALD, KYLE & BUERGER,
57th Floor, 600 Grant Street,
Pittsburgh, Pa. 15219,
Attorneys for Appellee.

PETITION FOR REHEARING BEFORE COURT EN BANC

AND NOW COMES your Petitioner, MARGARET L. POLLARD, by counsel, and petitions this Honorable Court for a rehearing in the above captioned case before a court *en banc* for the following reasons:

1. The above-captioned case was submitted under Third Circuit Rule 12(6) on January 16, 1979, by the Court (Adams and Weis, Circuit Judges, and Weiner, District Judge) *sua sponte*. This Honorable Court filed an Opinion on May 8, 1979, by Weiner, United States District Judge for the Eastern District of Pennsylvania, to which Adams, J., filed a dissenting opinion.

2. Counsel urges that the Court may have voted to eliminate oral argument because the issue is tightly constrained, not novel, and the briefs adequately cover the arguments. It is submitted that the question of accidental death in the circumstances is not novel, having been decided in favor of the party seeking relief by the United States Supreme Court in

Landress v. Phoenix Mutual Life Ins. Co., 291 U. S. 491, where Mr. Justice Cardozo speaking for the Court abolished the distinction between accidental result and accidental means where the act which set in motion the end result was taken or done voluntarily but without intending the final effect. This phase of the case was clearly controlled by *Landress*, implemented in Pennsylvania by *Beckham v. Travelers Ins. Co.*, 225 A. 2d 532.

3. In her Brief, the Appellant complained about the inadequacy of the Court's charge and rulings on the admission of certain documents allegedly contra to the format for admissibility outlined in the Federal Rules of Evidence.

4. The majority opinion upheld the lower court in refusing to admit into evidence the death certificate, the Coroner's report, and the pathologist's necropsy report, not because they embraced the ultimate issue to be decided by the jury, but that the trial judge (Sorg, J., now deceased) theoretically or inferentially exercised his discretion in excluding the evidence on the ground that the probative value thereof would be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, but such could not be the case since there was no evidence of either suicide or homicide.[1] Counsel submits that the jury could not have been confused since there was not a

[1] Homicide could possibly be inferred because the decedent's bedroom was absolutely devoid of any evidence whatsoever that there had been ingestion of large quantities of sedatives or analgesics especially in the light of the high blood level content of the drugs in question.

scintilla of evidence that the decedent intentionally took his own life.[2]

5. As indicated by Judge Adams' dissent, the court below failed to exercise his discretion under Rule 403 in not balancing the probative value of the evidence against any possible unfair prejudicial effect.[3]

6. The question propounded by the jury requesting further instructions where the evidence was evenly balanced establishes beyond doubt that the Coroner's and pathologist's reports which certainly rate higher than mere opinion evidence would have tipped the scales in favor of the plaintiff.

7. It is conceivable that this appeal presents a novel legal issue on the question of whether or not the Appellate Tribunal may substitute its exercise of discretion where the trial judge failed to do so.

8. Counsel submits that if oral argument is granted, that members of the Court may have questions to ask counsel which may clarify important legal, factual or procedural points or issues in the record.

---

[2] The only evidence in the record on this phase of the case was produced by defendant's pathologist who offered an opinion to a hypothetical question that in view of the high blood level content of the several drugs there must have been an intention to take his own life, absent any other facts or evidence, the counter vailing testimony of plaintiff's pathologist establishing that because of the high alcohol level, the decedent's mental faculties were seriously compromised and he could not have formed any intention to take his own life.

[3] The trial judge's reason for excluding the proferred evidence was based on the "ultimate issue" rule which has been abolished by F.R.E. 704.

9. The Appellant urged in her Brief that under the law of Pennsylvania, at F.R.E. 802 (4), (6), (8), (9), 803 (9), 901 (7) and 902 (3) that the records are admissible as exceptions to the hearsay rule and as copies of official records.

10. The majority opinion ignored the offer of Mrs. Pollard to admit into evidence the depositions of doctors Brissie and Gadsden in a companion case wherein the widow (Appellant here) sought to recover death benefits under the Pennsylvania Worker's Compensation Act against the employer, Westinghouse Electric Corporation. If they are admissible, then the deposition exhibits comprising the death certificate, the Coroner's certificate and the autopsy protocol attached thereto become admissible *ipso facto.*

11. Calling this Court's attention to the Points for Charge submitted by the Appellant, the court below ignored the following:

> 3. An expert's opinion indicating suicide is not sufficient to take that issue to the jury in the absence of any testimony or evidence to permit that conclusion. *Ray v. Philadelphia,* 344 Pa. 439.
>
> 5. An overdose of drugs and/or alcohol resulting in death is accidental death by external and violent means. *Beckham v. Travelers Ins. Co.,* 424 Pa. 105.
>
> 6. If one voluntarily takes any substance into the stomach through the mouth which sets in motion a chain of events resulting in vomiting some of the substance, causing death by asphyxiation, the means is external. *Guaranty Bank v. National Life,* 324 So. 2d 908.

7. Where one voluntarily takes any substance into the stomach through the mouth causing a result, namely death, unexpected, unforeseen and unanticipated for such person the means is accidental. *Jones v. Aetna Life*, 439 S. W. 2d 721.

8. The law of Pennsylvania where the contract was made, and where there is the greatest degree of relationship to the decedent governs the interpretation of the contract. *Zukoski v. Baltimore & O. R. Co.*, 315 F. 2d 622; *Neville Chemical Co. v. Union Carbide Corp.*, 422 F. 2d 1205.

10. The fact that the insured died in South Carolina does not alter the rules of interpretation of this Pennsylvania contract. *Foley v. Pittsburgh-Des Moines Co.*, 68 A. 2d 517, 363 Pa. 1 (1949).

12. Only an affirmative defense by clear, positive, credible and uncontradicted testimony can rebut this presumption against suicide. *Hartig v. American Ice*, 290 Pa. 21; *New York Life v. Kivekauskas*, 63 F. 2d 89b; Cert. Den. 289 U. S. 762.

12. The Court below erroneously charged the jury to first determine the cause of the decedent's death, which was undenied and undeniable, the evidence being clear that the cause of death was asphyxiation caused by regurgitation of stomach contents. In addition, the Court asked the jury to determine if the substances which caused asphyxiation were intentionally taken! There was evidence that the ignestion of the whiskey was intentional, no evidence, however, how the drugs entered decedent's stomach, but in any event, even if the latter were ingested intentionally, there was no evidence that the decedent intended to take his own life. This charge

was clearly erroneous and as a whole put the jury in a quandary, in effect asking them to decide whether or not the decedent took his own life.[4]

On the basis of the foregoing and the Statement of Counsel following herein, the Appellant respectfully urges this Honorable Court to grant a rehearing *en banc* in order that the issues in this case may be fully argued and discussed and that the same be disposed of by this Honorable Court in the light of the clear principles of law enunciated in the Appellant's Brief and the erudite Opinion in Judge Adams' dissent.

Respectfully submitted,

SAMUEL J. GOLDSTEIN,
Counsel for Appellant, Petitioner.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and professional judgment, that the panel decision is contrary to the decisions of the Supreme Court of the United States and the decisions of the United States Circuit Court of Appeals for the Third Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court. It is further suggested that the decision is contrary to *Landress v. Phoenix Life Ins. Co.*, 291 U. S. 491; *United States v. Long*,

[4] It is impossible to subscribe to the doctrine as the Court charged that the evidence might be evenly balanced on the issue of accidental means or non-accidental means.

574 F. 2d 761, 3rd Cir. 1978; Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above,* 22 Syracuse L. Rev. 635, 666 (1971); *Schofield v. United States,* 421 U. S. 1015.

SAMUEL J. GOLDSTEIN,
Attorney for Appellant-Petitioner.

APPENDIX B

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1934

MARGARET L. POLLARD,
Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges,* and WEINER,* *District Judge.*

The petition for rehearing filed by
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service and no judge who concurred in the decision having

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

JOSEPH F. WEIS, JR.,
Judge.

Dated: June 1, 1979

RECEIVED & FILED
JUN -1 1979
THOMAS F. QUINN
CLERK

APPENDIX C

Opinion

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1934

MARGARET L. POLLARD,
Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Appellee.

Appeal From the Judgment of the United States District Court for the Western District of Pennsylvania

(D.C. Civil No. 75-811)

Submitted Under Third Circuit Rule 12(6)
on January 16, 1979

Before: Adams and Weis, *Circuit Judges*, and Weiner, *District Judge.**

(Opinion filed May 8, 1979)

---

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

SAMUEL J. GOLDSTEIN, ESQ.,
1003 Law & Finance Building,
Pittsburgh, Penna. 15219,
Attorney for Appellant.

ALEXANDER BLACK, ESQ.,
BRUCE I. BOOKEN,
BUCHANAN, INGERSOLL,
RODEWALD, KYLE & BUERGER,
57th Floor, 600 Grant Street,
Pittsburgh, Penna. 15219,
Attorneys for Appellee.

OPINION OF THE COURT

Weiner, *J.*

The appellant in this diversity case seeks to overturn a jury verdict rendered in favor of the defendant, the Metropolitan Life Insurance Company. The jury found that the appellant was not entitled to recover accidental death insurance benefits under two policies covering her deceased husband. The trial judge entered judgment for the defendant, and denied the appellant's motion for a new trial. Upon review of the evidentiary rulings and jury instructions which have been attacked by the appellant, we conclude that no error was committed by the court below. Accordingly we affirm the judgment and the denial of appellant's motion for a new trial.

The record shows that on October 7, 1974, the appellant's husband, Walter Pollard, a resident of Greensburg, Pennsylvania, was in Hampton, South Carolina for a business conference. He and his co-workers were assigned separate bedrooms at the Micarta Lodge, which was owned by their

employer, the Westinghouse Electric Corporation. That evening, Mr. Pollard and several other employees dined at a restaurant that served alcoholic beverages. After dinner, Pollard and his co-workers returned to the Lodge where, after a short time, Pollard's speech became slurred and he stumbled when attempting to rise from his seat. Believing that Pollard was drunk, two co-workers escorted Pollard to his room and placed him on his bed fully clothed. The next morning, Pollard was found dead in his room.

A necropsy report indicated that Pollard died as a result of asphyxia due to aspiration of his gastric contents caused by acute alcohol and drug intoxication.[1] The report also showed enlargement and fatty degeneration of his liver, and mild to moderate atherosclerosis.

The decedent was insured by the defendant, the Metropolitan Life Insurance Co., under two group insurance policies providing for benefits upon accidental death. Under the terms of the policies, in order to recover, death must have occurred to the insured, "solely by violent, external and accidental means". Both policies contain a clause which bars payment of death benefits when death is caused by or results from "intentional self-destruction or intentionally self-inflicted injury while sane or insane". Citing the ingestion of alcohol and tranquilizers by the decedent, and the

---

[1] A toxicological examination revealed that Pollard had a blood ethanol level of 322 mgm./dl. A urine drug screen revealed Pentobarbital, Phenothiazine and Propoxyphene. The blood levels were: Pentobarbital 2.1 mgm./100 cc., Propoxyphene 0.4 mgm./100 cc., Phenothiazine 1.6 mgm./100 cc.

enlargement and fatty degeneration of the decedent's liver, the defendant refused to pay Pollard's widow the death benefits provided by the policies.

At trial, the appellant sought to introduce into evidence the death certificate, coroner's certificate (cause of death memorandum) and pathologist's (necropsy) report. Her first ground for reversal is that the trial judge erred when he ruled that the documents would be admitted into evidence only if statements contained within them, which declared that the death was accidental, were excised.[2] It was ostensibly because of this limitation that the appellant ultimately decided not to present the documents to the jury (Tr. 430).

We must first determine which body of law is looked to when deciding whether the limitation imposed on the admissibility of the documents was erroneous. The appellant asserts that since Pennsylvania law governs the rights of the parties under the insurance contract, Pennsylvania evidentiary law is controlling with regard to the admissibility of the death certificate. She also contends that along with the Federal Rules of Evidence, Pennsylvania law is looked to with regard to the admissibility of the coroner's certificate and pathologist's report. The appellee maintains that the Federal Rules of Evidence control these evidentiary issues.

We hold that the Federal Rules of Evidence govern the admissibility of documentary evidence in Federal diversity

[2] Although the appellant states in her brief that the court "refused to permit the foregoing materials to be submitted to the jury", the transcript shows that the judge would have admitted the materials subject to the limitation (Tr. 429).

cases.[3] *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1140 (5th Cir. 1977); *Conway v. Chemical Leaman Tank Lines, Inc.*, 525 F.2d 927, 930 (5th Cir. 1976). *See United Telecommunications v. American Tel. & Communications Corp.*, 536 F.2d 1310, 1316 (10th Cir. 1976). The rules were enacted by Congress to "govern proceedings in the courts of the United States". Rule 101. While the rules do show a desire by Congress to defer to state law in diversity cases on such matters as presumptions (Rule 302), privileges (Rule 501) and competency (Rule 601), there is no similar deference concerning the admissibility of documentary evidence.

The law is well settled that we are to review a trial judge's discretionary determination using the "manifestly erroneous" standard. *Salem v. United States Lines Co.*, 441 F.2d 473 (3d Cir. 1971); *United States v. Lopez*, 543 F.2d 1156, 1158 (5th Cir. 1976) *cert. denied*, 429 U.S. 1111 (1977). An examination of the record indicates that the limitation imposed on the admission of the documents did not violate the Federal Rules of Evidence. Under Rule 403, a trial judge can exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice. . .".

[3] The Federal Rule of Evidence applies to actions brought "subsequent to the one hundred and eightieth day after January 2, 1975" (July 1, 1975). Pub. L. 93-595. Although this case was instituted on June 30, 1975, the statute adopting the Rules also states that they are to apply to "further procedure in actions, cases and proceedings then pending to the extent that application of the rules would not be feasible or would work injustice". Since this case was tried on June 13, 14, and 15, 1977, almost two years after the Rules of Evidence went into effect, these rules are properly applied in determining the propriety of the district court's evidentiary rulings.

The following factors support our conclusion that the trial judge's ruling was not "manifestly erroneous". The death certificate and coroner's certificate report describe the cause of death as asphyxia due to aspiration of gastric contents due to acute ethanol intoxication, and conclude that death was accidental. However, the probative value of these documents undoubtedly was slight, because they were prepared prior to October 16, 1974, when the toxicologist's report was completed.[4] Moreover, Dr. Brissie, the consulting pathologist who assisted in the preparation of the necropsy report, testified that he did not serve as a medical examiner for the coroner. He also testified that in view of the information added by the toxicologist's report, he certainly would amend the cause of death form (Tr. 207-209).

To be balanced against the probative value is the evidence's prejudicial effect. Dr. Brissie testified that he was neither requested to investigate this death, nor informed of the precise language of the accidental death provision of the policy (Tr. 209-210). It is apparent that if the documents had been freely admitted into evidence, without limitation on content, the jury would have been misled into believing that the documents were based on a comprehensive investigation grounded on complete information and that Dr. Brissie's conclusion as to the manner of death took into consideration the language used in the policy.

[4] The toxicologist's report revealed an overdose of multiple depressant drugs and ethanol.

In addition, it must be noted that the coroner is required to make a determination regarding the cause of death. Though he is to determine whether the death was a homicide, a suicide or an accident, and is to conclude whether it was natural or undetermined, his decision is not binding for purposes of suit, for it is used merely for statistical purposes and to guide the district attorney's office and/or any parties (Tr. 207-209).

Another factor which the court undoubtedly believed would prejudice the jury was the fact that the term "accidental death", as defined in the policy, may well have had a different meaning than that term as used by Dr. Brissie in his report.

Lastly, we note that the trial judge's ruling did not keep objective factors from the jury. He states:

> "The exhibits that refer to [the] accident need not be given to the jury. If they make a request, we will give it to them in an appropriate form" (Tr. 429-430)

Appellee's counsel then suggested that the word accident could be blanked off. We find the judge's ruling to be a precautionary measure taken to safeguard the jury from prejudice. After defining the word "accidental" in both its everyday usage and as used in the policy, he properly left to the jury the determination whether the evidence and objective factors proved "accidental death". We therefore conclude that his rulings on this point were not "manifestly erroneous".[5]

[5] The appellant also points to Rule 803(9) which provided an exception to the hearsay rule for records of vital statistics and to Rule 901(7) which pertains to the authentication of public records as an additional basis for the total admissibility of the documents involved in this case. However, these rules do not mandate the admission of evidence, but only provide a means for allowing into evidence documents which are otherwise admissible. *See* Advisory Committee's Notes to Rule 803 and Rule 901(b).

The appellant further argues that several portions of the court's charge to the jury were not in accordance with Pennsylvania law, which both parties agree controls the substantive issues at bar. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Daburlos v. Commercial Ins. Co. of Newark, N.J.*, 521 F.2d 18, 19 (3rd Cir. 1975). One alleged error involves the "presumption against suicide". The court instructed the jury that in determining whether Mr. Pollard's death was accidental or intentional, the jury is, "permitted to consider the fact that there is in human nature, an instinct for self-preservation. But these circumstances does (sic) not in and of itself establish the fact that Mr. Pollard died through accidental means".

The appellant appears to assert that the jury should have been instructed that in the absence of facts establishing otherwise, it should presume accidental death. Ironically, this contention ignores the very case on which the appellant primarily relies. In *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 172 A. 644, (1934) the Pennsylvania Supreme Court stated that the "so-called presumption against suicide," is "merely a permissible consideration of the non-probability of death by suicide," and properly speaking is not a presumption at all. It is a well established rule that on the issue of accidental death, it is the plaintiff who has the ultimate burden of establishing that death resulted from an accident rather than from suicide. *Id.*, 315 Pa. 497, 505, 506, 173 A. 644, 648-649; *Waldron v. Metropolitan Life Ins. Co.*, 347 Pa. 257, 31 A.2d 902 (1943); *Heffron v. Prudential Ins. Co. of America*, 144 Pa. Super. 307, 19 A.2d 556 (1941). The judge's instruction regarding the presumption against suicide is therefore a correct statement of Pennsylvania law. Although the appellant cites *MacDonald v. Penna. R.R.*, 348 Pa. 558, 36 A.2d 316 (1944), neither it nor other Pennsylvania decisions lead to a contrary view.

The appellant advances several other contentions, each of which is easily disposed of. She asserts that the court below did not properly charge the jury on the weight to be accorded to the expert testimony presented at trial, because it failed to state that opinion evidence is the "weakest form of evidence". The court instructed the jury that it "should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You may accept the opinion or reject it entirely". While an instruction such as that advocated by the appellant might be called for when the opinion of an expert was in clear contradiction to "positive evidence of actual facts", *Kuchinic v. McCrory*, 439 Pa. 314, 319, 266 A.2d 723, 725-726 (1970); *Ray v. Philadelphia*, 344 Pa. 439, 441-42, 25 A.2d 145, 146 (1942), the testimony of the medical experts in this case regarding the cause of death was consistent with factual evidence presented at the trial. Accordingly, the judge's instruction was correct. *See Marrazzo v. Scranton Nehi Bottling Co.*, 422 Pa. 518, 223 A.2d 17 (1966); *Masciantonio Will*, 392 Pa. 362, 383-384, 141 A.2d 362, 372-373 (1958).

As another ground for reversal, the appellant contends that the trial judge incorrectly charged the jury on the meaning of "accidental" death. The judge stated that the term "accidental" means "undesigned, unexpected and unpremeditated". He told the jury that if it found that "the substances that caused asphyxiation *were intentionally taken by Mr. Pollard for the purpose of self-destruction or for the purpose of inflicting serious bodily injury on himself*", (emphasis sup-

plied) then it should not find that the insured's death was accidental.[6]

The appellant cites *Beckham v. Travelers Ins. Co.*, 424 Pa. 107, 225 A.2d 532 (1967) in support of her assertion that the above instruction is in conflict with the governing Pennsylvania law on the subject of accidental death. In *Beckham*, the Pennsylvania Supreme Court abolished the rule that denied recovery of insurance benefits for accidental death, "if the insured's death, although unintentional, resulted from an intentional act of the deceased". *Id.*, at 110, 225 A.2d at 533. In abandoning its former rule, the court allowed recovery under an insurance policy covering death "through accidental means", in a case where the occurrence of death was accidental, and the acts leading to death, although intentionally committed, were not engaged in by the insured for the purpose of committing suicide. However, the court countenanced the inclusion of contractual limitations in insurance policies which would disclaim coverage when the insured intentionally exposed himself to danger. *Id.* at 117, 225 A.2d at 537.

In light of the above, the court's instruction must be regarded as proper. The court did not state that the jury should find that death was not accidental if it merely found that the decedent intentionally, although without suicidal intent, ingested the substances causing asphyxiation. Instead,

[6] Although the policies restricted benefits to death which occurred solely through "violent, external and accidental" means, the Judge instructed the jury that death caused by the ingestion or consumption of drugs or a combination of drugs and alcohol is caused by violent and external means. Therefore, the key issue for jury determination was whether death was accidental.

the court charged that in determining whether the plaintiff had met her burden of showing that death was accidental, the jury should decide whether the substances were intentionally ingested "for the purpose of self-destruction". Moreover, in instructing the jury that it could make a finding that death was not accidental if it determined that the substances were intentionally taken by the deceased for the purpose of "inflicting serious bodily injury on himself", the court was merely restating a clause in the insurance policies which barred recovery for such deaths.

Having found that the appellant's arguments are without merit,[7] the judgment of the district court is affirmed.

Adams, *Circuit Judge*, dissenting.

On the morning of October 7, 1974, Walter Pollard of Greensburg, Pennsylvania, was found dead in his hotel room in South Carolina, where he and a number of co-workers had been attending a business conference organized by their employer, Westinghouse Electric Corporation. The previous evening, Pollard and other employees had dined together at a restaurant, where he had consumed several alcoholic drinks. When later that evening Pollard's speech became slurred and

[7] We do not reach the merits of the appellant's contention that the trial judge's charge to the jury on the meaning of preponderance of the evidence was erroneous. Appellant did not object to this instruction before the jury retired, and is therefore precluded under Rule 51 of the Federal Rules of Civil Procedure from assigning this as an error. *Halij v. Fogarty*, 449 F.2d 1295 (3d Cir. 1971); *Jennings v. Boenning & Company*, 388 F. Supp. 1294, 1303-1304 (E.D. Pa. 1975) *aff.* 523 F.2d 889 (3d Cir. 1975). *See Paluch v. Erie Lackawanna Railroad Co.*, 387 F.2d 996, 999-1000 (3d Cir. 1968).

he was unable to navigate easily, two co-workers escorted him to his room, leaving him fully clothed on his bed. Post-mortem tests revealed that Pollard's blood contained large quantities of alcohol and tranquilizers, and that he had died from asphyxiation resulting from aspiration of his gastric contents caused by alcohol and drug intoxication.

The majority has, in my view, properly disposed of most of the issues raised on this appeal by Margaret Pollard, who was unable to persuade a jury that she was entitled to recover on two life insurance policies insuring her deceased husband against accidental death. I believe, however, that the district court committed two errors that may not be overlooked under the harmless error rule,[1] and that a remand for a new trial is therefore warranted. First, the trial judge failed to instruct the jury properly on the meaning of "accidental" death. Second, the judge excluded statements contained in applicable death reports and documents that attributed Walter Pollard's death to accidental causes, without complying with the mandate of Federal Rule of Evidence 403.

A.

Because the insurance company's obligations in this diversity case are governed by Pennsylvania law, an appropriate analysis of the jury charge on the meaning of "accidental" death must begin with an examination of controlling state court precedent. At one time, an insurance company was not

[1] 28 U.S.C. § 2111: "*Harmless error.* On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

required under Pennsylvania law to pay the beneficiary of a conventional accidental death policy if the decedent died as the result of an intentional act performed by him, even though that act was not performed with the purpose of committing suicide. Pennsylvania adhered to the "accidental means—accidental result" test, whereby a death was deemed "accidental" only if *both* the means and the result were truly accidental; it did not permit recovery if an unintended death resulted from an intentional act. But this distinction was widely perceived as an untenable one that created inconsistent and frequently unjust results.[2]

To remedy this state of affairs, the Pennsylvania Supreme Court joined the modern trend, which was spearheaded by Justice Cardozo in his dissent in *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 (1934),[3] and thus abandoned what it termed the "artificial distinction between accidental means

[2] *See* Beckham v. Travelers Insurance Co., 424 Pa. 107, 111-15, 225 A.2d 532, 534-35 (1967).

[3] Justice Cardozo had this to say about the accidental means-accidental result dichotomy:

> The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian bog. "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident." . . . On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company. . . . The proposed distinction will not survive the application of that test.

291 U.S. at 499.

and accidental results."[4] Justice Roberts, speaking for the Court in *Beckham v. Travelers Ins. Co.*, 424 Pa. 107, 225 A.2d 532 (1967), explained this clear departure from earlier precedent:

> Continued adherence to this distinction would not only fail to serve a useful purpose but would condone ambiguity in a context in which we have traditionally insisted upon clarity and precision.[5]

A prime concern to the Pennsylvania Supreme Court, in *Beckham* as well as in later cases, has been that the reasonable expectation of an insured not be frustrated by the use of technical and ambiguous language in an insurance contract that would be susceptible of different interpretations.[6] Accordingly, if an insurance company desires to disclaim liability when death results from an act intentionally performed by the deceased though without an intent to commit suicide, it may do so, but only through an explicit limitation upon coverage.[7] Absent an express provision to that effect, the *Beckham* court declared, policies covering accidental death would be construed by Pennsylvania courts so as to conform to the public's expectations:

> When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.[8]

---

[4] *Beckham, supra,* 424 Pa. at 115, 225 A.2d at 535.

[5] *Id.*

[6] *See, e.g., id.;* Collister v. Nationwide Life Ins. Co., ... Pa. ....., ..., 388 A.2d 1346, 1353 (1978), *cert. denied,* 47 U.S.L.W. 3465 (Jan. 9, 1979).

[7] "While we see nothing improper in a contractual limitation which would disclaim coverage in cases such as the instant one, we are unwilling to recognize such a restriction on the basis of the ambiguous language contained in this policy which the insurance company knew was susceptible of different interpretations." 424 Pa. at 117, 225 A.2d at 537 (footnote omitted).

[8] *Id., quoting Landress, supra,* 291 U.S. at 499.

Arguably, the present case is illustrative of the type of situation that the *Beckham* rule was designed to cover. Where an insured such as Walter Pollard dies because he had ingested—presumably intentionally—alcohol, drugs or any other potentially lethal substance, and there is no evidence that he did so with the intention of committing suicide, the insurance company may not, under *Beckham,* avoid its contractual obligation by arguing that death did not result from "accidental means" because the toxic substance was intentionally consumed. Indeed, *Beckham* itself involved an insured who had died as a result of a self-administered overdose of narcotics, and yet recovery was permitted.

In addition, the Metropolitan Life policies under which Walter Pollard was insured contained a typical personal accident insurance plan, similar in its operative language to that of the policy in question in the *Beckham* case: they guaranteed payment in the event of death or bodily injury sustained solely through "accidental means."[9] The term "accidental

---

[9] The Metropolitan Life policies issued to Mr. Pollard provide for the payment of benefits in the event that the insured suffers bodily injury or death "solely through violent external and accidental means. . . ." The judge instructed the jury that "death caused by the ingestion or consumption of drugs or a combination of drugs and alcohol is caused by violent and external means," app. at 14a, and this charge was not challenged by the insurance company. *Beckham* involved a provision for double indemnity in the event that "bodily injury not hereinafter excepted effected directly and independently of all other causes through accidental means shall be sustained by a Participant while insured under this Part and shall result [in death]." *See* 424 Pa. at 109, 225 P.2d at 532.

means" was not explicitly defined in the Metropolitan Life policies to exclude situations where death or injury results from acts intentionally performed by the deceased even though those acts were performed without the purpose of inflicting self harm.[10] Therefore, the insurance company's obligation here is governed by the *Beckham* rule, and in the event of death the company must pay the beneficiaries so long as the death was not a suicide or the result of any other excluded cause.

With this background, it is apparent, at least to me, that the district court's charge was fatally deficient because it did not properly instruct the jury regarding the definition of "accidental death" under Pennsylvania law. The jury could have been charged, as plaintiff had requested,[11] that death is deemed to be caused by "accidental means" when a person voluntarily ingests a substance causing his demise, without expecting, foreseeing or anticipating death. Such a charge would have reflected Pennsylvania law under the *Beckham* case, which plaintiff had specifically brought to the court's attention. In view of the plaintiff's request, the trial judge could also have charged that "accidental death" is death that is not purposeful or suicidal, thereby avoiding altogether the use of the potentially confusing words "accidental means." The charge as given, however, seems to have perpetuated the ambiguities of the discredited accidental means-accidental result approach.

[10] As is common in such policies, however, there was an exclusion for death by suicide or bodily injury that was purposely inflicted. The Metropolitan Life policies provided that "in no case shall any payment be made for death or other loss which is . . . caused by or resulting from intentional self-destruction or intentionally self-inflicted injury, while sane or insane. . . ." App. at 40a.

[11] *See* app. 8a (point 7 of plaintiff's points for charge).

The jury was instructed that plaintiff may recover only if death was caused "solely by accidental means;" but the court never clarified the essential point that death occurs "solely by accidental means" even if it results from the intentional ingestion of alcohol and drugs, so long as such items were not consumed for the purpose of self-destruction. The trial court may have attempted to clarify the controlling law when in the course of its charge it instructed the jury that after they establish the cause of death they must then determine whether the substances were taken by Mr. Pollard intentionally "for the *purpose* of self-destruction or for the *purpose* of inflicting serious bodily injury upon himself." But this effort was then undermined by the court's underscoring, an additional four times, that, if there is to be a recovery, death must have been caused through "accidental *means.*" Finally, there was the concluding enigmatic instruction:

> Now, even though the facts and circumstances of this case [sic] you find that it is possible to infer that the insured's death resulted from accidental means, *if you also find it is equally plausible to infer that the insured's death resulted from other means such as intentional self-inflicted injury, then your verdict must be for the defendant.* Stated in another way, in this case, there is no burden on the defendant to prove that the insured died from intentional self destruction. Rather, the burden is on the plaintiff to persuade you by a preponderance of the evidence that the insured's death was *solely the result of accidental means.*

In sum, as can be appreciated from a reading of the relevant portion of the jury charge, set forth in the margin,[12] the necessity for plaintiff to establish death by "accidental *means*" was emphasized and reemphasized, but not once was the jury told that they might return a favorable verdict for the plaintiff if they found that death resulted from the knowing and intentional ingestion of drugs and alcohol, so long as there was no intent to commit suicide. In fact, given the focus on "intentional self-inflicted injury" in a case that did not involve bodily injury in contradistinction to death, the jury may have been led to believe that they must find for the insurance company if they determined that death resulted from Pollard's intentional consumption of drugs and alcohol. Because in my view this charge did not comport with Pennsylvania law, it constituted reversible error.

---

[12] The jury was instructed:

> The plaintiff is not entitled to recover if you do not find by a preponderance of the evidence that her husband's death was caused solely by accidental means. You are instructed that death caused by the ingestion or consumption of drugs or a combination of drugs and alcohol is caused by violent and external means. Bear in mind, however, that the policies in issue do not cover a death which is merely external and violent. It must also be accidental.
>
> The term "accidental" means undesigned, unintended, unexpected, and unpremeditated. The word "accidental" is the antithesis of intention. The concept is further set forth in terms and conditions of the policies in issue as follows: "In no case shall any payment be made for death or any other loss which is caused by or resulting from intentional self destruction or intentional self-inflicted injury while sane or insane.
>
> In determining whether or not the plaintiff has met her burden, you should first decide the cause of Mr. Pollard's death. The coroner's certificate indicates the death was caused by asphyxiation. If you find that asphyxiation was the result of the ingestion of drugs or drugs and alcohol in harmful quantities, an inference that the consumption of

(Footnote continued on following page)

B.

There is a second aspect of this case that is also troubling. Plaintiff had sought to introduce into evidence the death certificate, the coroner's report, and the pathologist's necropsy report. In each of these documents the medical examiner or other official who is completing the form is asked what in his judgment was the probable cause of death. In Pollard's case, the answer supplied in each document was "accidental."

(Footnote continued from preceding page)

> drugs or drugs and alcohol was the cause of death is permissible. If the consumption caused the asphyxiation, then the consumption of the drugs or drugs and alcohol was the cause, or an inference that the consumption of drugs or alcohol was the cause of death, if it causes the asphyxiation. But, this is for you to determine.
>
> You are then required to determine whether or not the substances that caused asphyxiation were intentionally taken by Mr. Pollard for the purpose of self destruction or for the purpose of inflicting serious bodily injury upon himself. In making this decision, you are permitted to consider the fact that there is in human nature, an instinct for self-preservation. But these circumstances does not in and of itself establish the fact that Mr. Pollard died through accidental means. You may regard this as a fact, but must consider all the evidence in determining whether or not Mr. Pollard's death was accidental.
>
> Now, even though from the facts and circumstances of this case you find that it is possible to infer that the insured's death resulted from accidental means, if you also find it is equally plausible to infer that the insured's death resulted from other means such as intentional self-inflicted injury, then your verdict must be for the defendant. Stated in another way, in this case, there is no burden on the defendant to prove that the insured died from intentional self destruction. Rather, the burden is on the plaintiff to persuade you by a preponderance of the evidence that the insured's death was solely the result of accidental means.
>
> If you find that the evidence is evenly balanced on the issue of death by accidental means or death due to non-accidental means, then your verdict must be for the defendant. This is another way of saying that the burden is on the plaintiff to establish the fact that the death in this case was accidental.

The district court refused to allow any of the documents to be introduced into evidence unless the portions dealing with the cause of death were excised. The trial judge apparently based these evidentiary rulings on two grounds. First, he ruled the evidence inadmissible because it conveys an opinion on the ultimate issue in the case. Second, he looked to Pennsylvania law, which does not have a clear rule whether documents prepared at the time of death are admissible to prove the cause of death.[13]

In affirming the district court, the majority recognizes that the Federal Rules of Evidence, not Pennsylvania law, govern the admissibility of evidence in this case. The Federal Rules operate upon the premise that "[a]ll relevant evidence is admissible,"[14] and indeed declare outright that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[15] Thus, the evidence at issue here was clearly admissible under the Federal Rules, unless there was a countervailing reason for excluding it. The only such reason suggested by the majority is found in Rule 403, which gives the trial judge discretion to exclude any evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

[13] *See* app. 25a, where the court's order denying plaintiff's motion for a new trial indicated that the statements in the documents that attributed death to accidental causes were held to be not admissible because (a) no evidence may be employed to convey to the jury an opinion on the ultimate issue in the case, and because (b) *Lederer v. Metropolitan Life Insurance Company*, 135 Pa. Super. 61, 69, 4 A.2d 608, 613 (1939), expressly reserved opinion on the question whether such statements were admissible.

[14] Fed. R. Evid. 402.

[15] Fed. R. Evid. 704.

misleading the jury, . . ." The record makes it abundantly clear that this discretion was never exercised. There was no balancing of the probative value of the evidence tendered by plaintiff against any unfair prejudicial effect. Rather, the only references made were to Pennsylvania law regarding the admissibility of such documents and to a rule—different from that found in the Federal Rules of Evidence—that testimony conveying an opinion on the ultimate issue is inadmissible. Nonetheless, the majority asserts that what the trial judge did in this regard was not error. It does so by disregarding the actual basis of the trial judge's ruling and instead by itself engaging in the balancing required by Rule 403, concluding thereby that the district court's ruling was not "manifestly erroneous."

Putting to one side the issue whether the probative value of the evidence in question is outweighed by any unfair prejudicial effect,[16] the role that the majority delegates to itself is somewhat perplexing. The balancing contemplated by Rule 403 is, under the provisions of that rule, clearly to be performed by the trial judge. The reason is that it is the trial judge who is familiar with the evidence and who may examine the parties as to the circumstances surrounding the preparation of the documents and their accuracy, on the one hand, and possible unfair prejudice, on the other.[17] The role

[16] I do not venture a view whether in fact the tendered evidence should or should not have been excluded on the basis of a balancing under Rule 403, but should like to point out that the outcome is not foreordained. In any event, I do not believe that a ruling admitting the evidence in question would have been reversed as being "manifestly erroneous."

[17] *See* United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978).

of the appellate court in this respect is very limited: the appellate court is to uphold the trial judge's ruling so long as he did not abuse his discretion.[18] Yet, according to the majority, we may affirm a district court *even if it never exercised its discretion*,[19] provided that the district court's result is susceptible to a *post hoc* rationalization, supplied by the court of appeals.

For a number of reasons, I cannot agree with the course of action adopted by the majority in this regard. First, it would appear that the failure of a district court to exercise its discretion is itself an abuse of discretion, even if attributable to an erroneous belief on its part that it is bound by some non-discretionary rule of law.[20] Second, as the Supreme Court has indicated, it is improper for a court of appeals to undertake "a *de novo* examination of the record and itself [exercise] the discretionary function which the rule commits

[18] *See, e.g.*, United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976).

[19] Needless to say, this is not a case where the district judge actually balanced under Rule 403 but failed to set forth the reasons supporting the manner in which he exercised discretion, *see* United States v. Long, 574 F.2d 761, 768-72 (3d Cir. 1978) (Adams, J., concurring).

[20] *See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635, 666 (1971), where the author quotes this passage from Grow v. Wolcott, 123 Vt. 490, 492, 194 A.2d 403, 404 (1963):

> [W]here a party has called upon the court for a discretionary ruling, it is improper for the court to refuse to utilize its right to decide the question as a matter of discretion. Purporting to be bound to a rule as a matter of law will not satisfy the moving party's claim on the court's discretion.

See also In Re Grand Jury Proceedings (Schofield II), 507 F.2d 963, 972 (3d Cir.) (Aldisert, J., dissenting), *cert. denied sub nom.* Schofield v. United States, 421 U.S. 1015 (1975).

to the trial judge."[21] Rather, "[t]he function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand."[22] Finally, *post hoc* rationalizations are always suspect, and in other contexts have been held not to be acceptable substitutes for reasoned decisionmaking in the first instance.[23] I fail to see how this case is any different, particularly since here the rationalization has not even been provided by the original decisionmaker, but instead by a reviewing tribunal. Inasmuch as the exclusion of the evidence that was tendered in the present case cannot be said to have been harmless error, the proper course in my view would be to remand the case for a new trial.

Accordingly, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[21] Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245 (1964), (court of appeals improperly ordered transfer of a multi-venue case where discretion was vested in the district court pursuant to Fed. R. Crim. P. 21(b)).

[22] *Id.*

[23] *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80 (1943); Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705, 709-12 (D.C. Cir. 1977) (agency actions cannot be sustained on the basis of *post hoc* rationalizations supplied during judicial review).

APPENDIX D

Order

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-811

MARGARET L. POLLARD,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

AND NOW, this 21st day of May, 1978, the above-captioned matter having come on to be heard by the court and a jury, and after argument and upon due consideration of plaintiff's Motion for a New Trial,

IT APPEARING that the death certificate relating to the inusred was properly admitted into evidence subject to the limitation that no admitted documents or testimony would be employed to convey to the jury an opinion on the ultimate issue in the case, *i.e.*, the accidental, homicidal, or suicidal manner of the insured's death, the decision in *Lederer v. Metropolitan Life Insurance Company*, 135 Pa. Super. 61, 69, 4 A.2d 608, 612 (1939), upon which plaintiff relies, having expressly reserved opinion on this question, and

IT FURTHER APPEARING that, with respect to other evidence sought to be admitted for the purpose of stating an opinion on whether the insured's death was accidental, homicidal, or suicidal, exclusion of such evidence was

likewise proper; that the court did instruct the jury that the insured's death was "violent and external" as a matter of law; that plaintiff's counsel expressly waived objection to use of a transcript of a collateral Workmen's Compensation hearing as partial basis for certain expert testimony; and that plaintiff's remaining assigned errors regarding the exclusion of testimony of the Administrator of the insured's insurance program, and regarding the court's charge with respect to accidental death, preponderance of the evidence, and presumption against suicide as well as submission of the question of suicide to the jury, are clearly without merit,

IT IS ORDERED that the said Motion be and the same is hereby denied.

HERBERT P. SORG, *D.J.*

cc Counsel of Record

APPENDIX E

Transcript of Proceedings, June 6, 1977

(The following proceedings were held beginning at 9:30 a.m., June 6, 1977, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Herbert P. Sorg and a jury.)

Members of the Jury:

It is now your responsibility to decide from the evidence in this case whether the plaintiff is entitled to recover from the defendant on two insurance policies.

In your determination, you are to be guided by reason such as you use in carrying on your everyday affairs. You are not to be influenced by any sympathy or prejudice that you may feel for or against either of the parties. You must decide the facts and then apply the law as I will explain it to you. You are the sole judges of the facts. Therefore, you and you alone decide what is to be believed. In doing so, you must pass upon the credibility of witnesses.

You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge about any fact concerning which he testifies, his motive or reason for testifying, his interest in the case or any circumstances that may shed light on the truth or falsity of his testimony. It is for you to say what weight you will give to the testimony of any and all of the witnesses. You are at liberty in the exercise of honest judgment to believe or disbelieve the testimony of any witness in whole or in part, taking into consideration, of course, all facts and circumstances of the case.

In this connection, the rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. A witness who by education and experience has become an expert in any art, science, profession or calling may be permitted to state his opinion as to a matter as to which he is knowledgeable and which is material to the case and may also state the reasons for his opinions.

You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You may accept the opinion or reject it entirely. If you decide that the opinion is not based on sufficient education or experience, or if you conclude that the reasons given in support of the opinion are unsound, your verdict must be based entirely upon the evidence in this case. That is, the evidence that is brought before you in this courtroom.

The evidence consists of the testimony of the witnesses, the documents or exhibits that have been admitted. You are cautioned that remarks of counsel are not evidence; remarks of the Court are not evidence. Then too, the facts of the case must be decided by you according to your own recollection of the evidence. Therefore, you are not to be influenced by any express recollection of counsel or any indication of the recollection of the Court in deciding what the facts are, if such recollection is inconsistent with your own.

Now, for these reasons, the Court will not review all the testimony but will refer to certain evidence solely for the purpose of placing the law in context. It is your recollection of the evidence upon which your decision must be based. There is no dispute that at the time of his death on October 7 or 6, 1974, Walter Howard Pollard was the named insured in two accident insurance policies issued by the defendant, Metropolitan Life Insurance Company.

Under the terms of these policies, Margaret L. Pollard, the named beneficiary and plaintiff in this case, became entitled to the payment of $120,000 under one policy and $15,250 on the other in the event of the death of her husband, Walter Howard Pollard, if it occurred solely through violent, external, and accidental means. This action has been brought by the plaintiff to recover these amounts, the defendant having refused to make payment contending the death of Mr. Pollard was not caused by a violent, external, and accidental means and therefore, not covered by the terms of the insurance policy.

The plaintiff is entitled to recover if you find by a preponderance of the evidence that the insured, Walter Howard Pollard, died solely through external, violent, and accidental means. By preponderance of the evidence is meant that evidence which after due consideration of all the evidence outweighs the testimony to the contrary and therefore, leads to the conclusion which seems most probable to you. It does not mean a greater volume of evidence on one side or the other. It simply means that whatever evidence there is on one side of an issue is of greater convincing force, however slight, than the evidence to the contrary.

The plaintiff is not entitled to recover if you do not find by a preponderance of the evidence that her husband's death was caused solely by accidental means. You are instructed that death caused by the ingestion or consumption of drugs or a combination of drugs and alcohol is caused by violent and external means. Bear in mind, however, that the policies in issue do not cover a death which is merely external and violent. It must also be accidental.

The term "accidental" means undesigned, unintended, unexpected, and unpremeditated. The word "accidental" is the antithesis of intention. The concept is further set forth in terms and conditions of the policies in issue as follows: "In no case shall any payment be made for death or any other loss which is caused by or resulting from intentional self destruction or intentional self-inflicted injury while sane or insane."

In determining whether or not the plaintiff has met her burden, you should first decide the cause of Mr. Pollard's death. The coroner's certificate indicates the death was caused by asphyxiation. If you find that asphyxiation was the result of the ingestion of drugs or drugs and alcohol in harmful quantities, an inference that the consumption of drugs or drugs and alcohol was the cause of death is permissible. If the consumption caused the asphyxiation, then the consumption of the drugs or drugs and alcohol was the cause, or an inference that the consumption of drugs or drugs and alcohol was the cause of death, if it causes the asphyxiation. But, this is for you to determine.

You are then required to determine whether or not the substances that caused asphyxiation were intentionally taken by Mr. Pollard for the purpose of self destruction or for the purpose of inflicting serious bodily injury upon himself. In making this decision, you are permitted to consider the fact that there is in human nature, an instinct for self-preservation. But these circumstances does not in and of itself establish the fact that Mr. Pollard died through accidental means. You may regard this as a fact, but must consider all the evidence in determining whether or not Mr. Pollard's death was accidental.

Now, even though from the facts and circumstances of this case you find that it is possible to infer that the insured's death resulted from accidental means, if you also find it is equally plausible to infer that the insured's death resulted from other means such as intentional self-inflicted injury, then your verdict must be for the defendant. Stated in another way, in this case, there is no burden on the defendant to prove that the insured died from intentional self destruction. Rather, the burden is on the plaintiff to persuade you by a preponderance of the evidence that the insured's death was solely the result of accidental means.

If you find that the evidence is evenly balanced on the issue of death by accidental means or death due to non-accidental means, then your verdict must be for the defendant. This is another way of saying that the burden is on the plaintiff to establish the fact that the death in this case was accidental.

Now, members of the jury, give all the evidence careful, fair, and just consideration and render your verdict accordingly. If you find by a preponderance of the evidence that Mr. Pollard's death was caused by accidental means, your verdict should be in favor of the plaintiff. If you do not so find, your verdict should be for the defendant.

It is not necessary for you in this case to assess the damages; damages are fixed. If you find in favor of the plaintiff, judgment will be entered in favor of the plaintiff in the amount of $135,500, the sum total of the amounts which in the event of accidental death would be due under the two insurance policies here at issue.

It is suggested that before you begin your deliberations, you select from among your group a foreman to preside, possibly a secretary to perform such services as you may assign for the sake of keeping order. You will be provided a verdict sheet, a form upon which to return your verdict. You will note there are lines on this form for signature.

Because your verdict must be unanimous, your indication of unanimity will be given by your signatures. Each and every one of you should sign on one of the lines provided for signature. After having completed the form in the appropriate space, simply indicate whether your verdict is for the plaintiff or for the defendant.

Members of the jury, if there is any matter of law concerning which you should desire to have further instructions and which you wish to have further clarified, it is proper for you to make a request to that effect. In such event, put your question in writing, put the writing in an envelope, and seal it and deliver it to the bailiff who will be in attendance upon you. Then I will give you further instructions as to the law.

In communicating with the Court, however, do not reveal your deliberations such as how you stand on your verdict, for instance. Remember too, it is the proper function of the Court to give you instructions only as to the law. With respect to the matters of fact, you are the sole judges of the facts and the Court should not invade that perogative and responsibility of yours.

Do counsel wish to come to the bench?

(Whereupon, there was a side bar discussion held on the record.)

Mr. Black: I would request that the Court also instruct the jury that they need not concern themselves in the event of a verdict for the plaintiff, with the question of interest for the delay in payment. That that will be handled by the Court if there is a plaintiff's verdict.

I would except to the Court's refusal of my points four and five.

The Court: All right.

Mr. Black: Submitted in writing; that is all.

Mr. Goldstein: I just want to state for the record an exception to the refusal of the plaintiff's points for charge, sir, Judge Sorg.

The Court: Very well; All right.

(Side Bar discussion was then concluded.)

The Court: Members of the jury, I have suggested damages are fixed; they are. They, in fact, are by the terms of the insurance policy. There is a matter of interest that will be taken into consideration, but this can be determined as a matter of law. It is not necessary for you to indicate on your verdict forms any amounts should there be a verdict for the plaintiff. Of course, the issue is totally irrelevant and is immaterial if your verdict is for the defendant.

The amounts of any judgment that will be entered are not at all material to the issues.

If there is nothing further, the bailiffs will be sworn.

(Whereupon, the bailiffs were sworn.)

The Court: The six regular jurors appear to be in good health. The alternate jurors are excused with the thanks of the Court and will receive instructions from the clerk. The jury will retire.

(Whereupon, at 12:10 p.m. the jury retired.)

The Court: Court will be in recess.

Will counsel let the clerk know where they can be reached. We hope they will not be too far away from here because if there is a communication from the jury, we will not be kept waiting.

Mr. Black: Your Honor said you were reserving decision on my motion for a directed verdict.

The Court: I am.

Mr. Black: That was handed to you this morning.

The Court: Decision is reserved on the motion fo a directed verdict.

If there is nothing further, Court will be in recess.

Mr. Black: I just want to thank the Court for having been so courteous through this long and I am afraid sometimes boring trial.

The Court: Genuine pleasure to work with both counsel in this case.

Mr. Goldstein: Thank you, Judge Sorg.

(Whereupon, the Court was in recess.)